



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 111 OF 2009

KIMANI GATUNDU KANYORO

JOSEPH GITAU KIMANIAPPELLANTS

VERSUS

PETER KIMANI NGUGI.....1ST RESPONDENT
ROBERT MWAURA NGUGI2ND RESPONDENT
ANTHONY MUTURI NGUGI.....3RD RESPONDENT
GEOFFREY MBOCI NGUGI.....4TH RESPONDENT
JOHN LAWRENCE NGANGA.....5TH RESPONDENT

(Arising from the judgment of the Hon. Resident Magistrate MS E. E BOKE in Kandara civil Case No. 168 of 2007 delivered on 5th March 2009)

JUDGMENT

This judgment is the outcome of the appeal against the judgment of Hon. E. Boke, Learned Resident Magistrate delivered on 5th October 2009 vide Kandara R.M.C.C.C. no. 168 of 2007. The background of the facts leading to this appeal to be short and straightforward. By a plaint dated 9th August 2007, Peter Kimani Ngugi, Robert Mwaura Ngugi, Antony Muturi Ngugi, Geoffrey Mbochi Ngugi and John Lawrence Nganga being the 1st – 5th Respondents herein respectively sued Kimani Gatundu Kanyoro and Joseph Gitau Kimani, the 1st and 2nd Appellants herein respectively claiming for judgment in the following terms inter alia:

- (i) Kshs. 137,400 with interest at 10% pa from 24th July 2006 until full payment.**
- (ii) Costs of the suit.**

The appellants filed a defence to deny the Respondents' claim. Six witnesses testified in support of the Respondent's case. The claim for Kshs. 137,400 is on the basis that the same was advanced to the appellants by one Ngugi Karachio, deceased, the Respondents' father in 1997. It is said that the Appellants in return pledged title no.Loc. 4/Gakarara/980 as a collateral. The late Ngugi Karachio is said to have passed away in the year 2003. The Respondents said they discovered title to the aforesaid parcel of land to be in possession of the deceased in the same year their father died. It is said that the title was found together with a note showing that the deceased had advanced the Respondents Kshs. 137,400/-. The Respondents admit that they did not know the person whose name appeared on the title and the

note. They sought for the assistance of the area assistant chief to trace the owner. That is how the appellants were traced and identified. On 27th July 2006, the Appellants and the Respondents met in the offices of Muturi Njoroge Advocate whereupon the parties entered into a memorandum of agreement. In aforesaid agreement the Respondents admitted that the late Ngugi Karachio had advanced a sum of Kshs. 137,400/= to Kimani Gatundu Kanyoro on 2nd March 1997 and in return he pledged his title no. Loc. 4/Gakarara/980 as security. The Appellants requested the Respondents to release the aforesaid title upon promising to settle the debt within two months. They also promised to pay a penalty of 10% p.a. of the principal debt if they defaulted. Title was then surrendered to the Respondents pursuant to the agreement. The Respondents failed to honour the agreement thus the Respondents were prompted to file the suit before the Kandara R.M.'s court.

The appellants presented the evidence of four witnesses in support of their defence. They told the trial court that the debt i.e. Kshs. 6500/= was advanced in 1992 but was fully repaid to the deceased but the deceased refused to release the title deeds because he wanted to be paid interest. The Appellants also claimed that the deceased entered into an agreement in 1997 with Joseph Gitau Kimani, 2nd appellant herein in which he promised to pay Kshs. 137,400/= to the deceased as interest charged on the principal sum of Kshs. 6500/=. The learned trial magistrate considered the evidence tendered by both sides. The defence presented by the Appellants was disbelieved. The trial court found the suit in favour of the Respondents. Being aggrieved the Appellants preferred this appeal.

On appeal, the Appellants put forward the following grounds in their memorandum of Appeal:

- 1. The learned magistrate misdirected herself in failing to making findings that were not supported by evidence adduced.***
- 2. The learned magistrate erred in law in entertaining a claim that was evidently time barred.***
- 3. Having found the amount owed to a deceased person the learned magistrate erred in law in holding that the respondents could claim the same without first becoming legal representatives.***
- 4. The learned magistrate misdirected herself in finding that the memorandum of understanding gave any enforceable rights and therefore arrived at the wrong decision.***
- 5. The learned magistrate misdirected herself in failing to rule on whether or not the document made on 27/7/2006 was void ab initio and therefore proceeded on a wrong premise in law.***

When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have considered the written submissions filed by both sides. Two main grounds have emerged from those submissions. First, it is argued that the Respondents had no capacity to file a suit to claim a debt due to the estate of Ngugi Karachio before obtaining a grant of letters of administration. Secondly, that the debt was not repayable because it was time barred. The aforesaid grounds appear to have been raised and argued before the trial court.

Let me start with the first issue which is to the effect that the Respondents had no capacity to sue on behalf of the estate of Ngugi Karachio, deceased. Perhaps it is convenient at this juncture to look at how the learned trial magistrate determined this issue. The trial court came to the conclusion that the basis of the Respondent's suit was the contract entered between them on 27th July 2006 whereupon the Appellants acknowledged owing to the Respondents a sum of Kshs. 137,400/=. It is the view held by the learned magistrate that the memorandum of agreement was a new agreement. The trial court agreed that if the suit was based on the agreement executed between the Appellants and the deceased, then the court could have ruled that the Respondents lacked the legal capacity to sue for want of letters of administration. I have on my part re-examined the memorandum of agreement entered between the parties on 27th July 2006. The truth of matter is that the origin of the debt can only be traced to the documents which were in possession of Ngugi Karachio deceased. The Respondents did not know the appellants at the time of

discovering title to the parcel of land known as Loc. 4/Gakarara/980 and the note indicating the proprietor had left the title as a collateral to secure a friendly loan of Kshs. 137,400/= advanced to the Appellants by the deceased. The area assistant chief assisted the Respondents to trace the Appellants. On their own volition the Appellants and the Respondents converged in the offices of Muturi Njoroge Advocate to execute what is called Memorandum of Agreement dated 27th July 2006. In the aforesaid agreement the Respondents herein were referred to as 'creditors' while the Appellants were referred to as "debtors". The parties bound themselves in the aforesaid agreement in the following respects:

- (i) ***They acknowledge that the late Ngugi Karachio advanced to the Appellants (debtors) a sum of Kshs. 137,400/= on 2nd March 1997.***
- (ii) ***That the Appellants gave the late Ngugi Karachio title no.Loc. 4/Gakarara/980 as security.***
- (iii) ***The 'debtors' agreed to repay the aforesaid sum to the 'creditors' within a period of two months from 24th July 2006.***
- (iv) ***The 'creditors' agreed to surrender title no.Loc. 4/Gakarara/980 to the debtors.***
- (v) ***In default to repay the debt, the debtors agreed to pay a penalty of 10% of the debt.***
- (vi) ***The creditors were given the right to sue for recovery of the debt in court.***

There is no dispute that on the basis of the aforesaid agreement the Respondents (creditors) released title no.Loc. 4/Gakarara/980 to the Appellants (debtors). There is also no dispute that the Appellants have refused to settle the debt hence they breached their part of the bargain. They have now urged this court to find that the Respondents had no locus to sue them. I have carefully perused the plaint and it is clear that the basis of the suit is the memorandum of agreement entered on 24th July 2006. The Respondents did not sue the Appellants on behalf of the estate of their late father, Ngugi Karachio, deceased. They sued in their capacity as the signatories of the agreement which led to the release of the title no. Loc. 4/Gakarara/980 to the Appellants. It cannot now lie in the mouths of the Appellants to question the capacity of the Respondents yet they did not do so when they entered into the agreement which gave them possession of the title which was in lawful custody of the deceased. A court of law cannot countenance the Appellants to benefit from the fruits of trickery. In fact the doctrine of promissory estoppel bars the Appellants from raising that ground. The doctrine of Promissory estoppel is ably restated in Halsbury's Laws of England 3rd Ed. Vol. 15 as follows:

"When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

The doctrine perfectly applies to this case and the appellants cannot be allowed to go behind it. In the end I am convinced that the trial magistrate came to correct decision. In a nutshell there was no need for the Respondents to obtain letters of administration in respect of the estate of Ngugi Karachio, deceased in view of the terms of memorandum of agreement dated 24th July 2006. This was a new agreement whose terms were substantially different from those entered by the appellants and the deceased. The consideration of the old agreement was that the deceased would advance the Appellants money in exchange of retaining a title deposited with the deceased. The consideration of the new agreement was that the title would be released on the Appellant's undertaking that they would pay the money within two months from the date of the agreement. In fact there was a default clause allowing the Respondents to claim 10% of the principal debt and in addition to retain the discretion to sue if need be.

The second ground argued on appeal is to the effect that the suit was time-barred. The trial magistrate considered the issue and came to the conclusion that the Appellants had acknowledged the debt when they executed the Memorandum of the agreement hence time had not lapsed by the time of filing the suit. I have already stated that the memorandum of agreement was executed on 24th July 2006. The suit before the trial court was filed on 9th August 2007. It is obvious that this suit is based on contract. No action based on contract can be brought after the lapse of six years under S 4(1) of the Limitation of Actions Act. However the right to rely on S.4 of the Limitation of Actions Act denied when a debtor acknowledges the debt under S.23(3) of the same Act. Time starts to run again from the date of acknowledgment. In this case the appellants acknowledged the debt on 24th July 2006. Time started running from that date. The suit was filed first about 16 months after the acknowledgment of the debt. With respect, I agree with the decision of the trial Resident Magistrate that the defence raised by the Appellant was not available because they waived that right when they acknowledged the debt. In fact the agreement set up new terms which were not in the old agreement. The cause of action can comfortably be said to have arisen on 24th July 2006.

In the end, I see no merit in the appeal. The same is dismissed with costs to Respondents

Dated and delivered this 8th day of April 2011

**J.K. SERGON
JUDGE**

In open court in the absence of the parties but with notice.

**J.K. SERGON
JUDGE**